Office - Supreme Court, U.S.
FILED
MAR 18 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-320

In The
Supreme Court of the United States
October Term, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES, et al.,

Petitioners,

v.

CROW TRIBE OF INDIANS, et al.,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF FOR CROW RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Crow Tribe's sovereign immunity bars this action against the Crow Tribe, the Crow tribal entities and the Crow tribal officials.

2. Whether the Federal District Court properly entertained a suit challenging the civil jurisdiction of the Crow Tribal Court over a tort suit brought by a tribal member against a local School District based on an accident that took place within the Crow Reservation, when there was no claim of imminent irreparable injury and the School District had not appeared before the Tribal Court or made any attempt to exhaust tribal court remedies.

3. Whether the Crow Tribal Court may, as a matter of federal law, exercise civil jurisdiction over a tort suit brought by a tribal member against a School District when the accident took place on school grounds within the Crow Reservation, the accident was caused by the negligent maintenance of a dangerous condition and/or the inadequate supervision of Crow children during school hours, and the School District has regular, extensive, and significant contacts and connections with the Crow Tribe and its members.

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BRIEF FOR CROW RESPONDENTS

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STATEMENT OF THE CASE

In May 1982, Leroy Sage, a ten year old member of the Crow Tribe, was struck by a motorcycle on the grounds of the Lodge Grass Elementary School in Lodge Grass, Montana while returning from a school sponsored activity. The school is located within the exterior boundaries of the

Crow Reservation and 85 percent of its student body are Crow Indians. Five of the nine members of the Lodge Grass School Board also are members of the Crow Tribe.

In September 1982, Leroy Sage filed suit in Crow Tribal Court through his guardian, Flora Not Afraid. The complaint alleged that Sage's injuries were caused by the negligent conduct of Petitioner Lodge Grass School District No. 27 ("the School District"), specifically, the unsafe condition of the school parking lot and inadequate supervision during school hours.

The Chairman of the School Board, a member of the Crow Tribe, was served with process, but the School District did not answer or otherwise appear in Tribal Court. Accordingly, on October 19, 1982, a default judgment was entered in Tribal Court against the School District.[1] On October 25, 1982, the Tribal Court mailed a copy of the default judgment to the Chairman of the School Board. Both the principal official of the School District and its insurer, National Farmers Union Insurance Companies, had actual knowledge of the default judgment by October 29, 1982. Although Crow Tribal Court procedures permit default judgments to be set aside within 30 days, the School District took no action in Tribal Court. *See* Pet. App. 15a-16a; J.A. 16-17.

Instead, on November 2, 1982, the School District and its insurer filed suit in the Federal District Court for

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[1] Under the Crow Tribe's Rules of Civil Procedure, answers must be filed within fifteen days of service. J.A. 7-8, 16-17. The Chairman of the School District was served on September 28, 1982 and the default judgment was taken 21 days later, on October 19, 1982. Pet. App. 16a.

Montana. Named as Defendants were the Crow Tribe, the Crow Tribal Council, the Crow Tribal Court, Eddie Roundface, Glen Birdinground and Ira Lefthand, judges of the Crow Tribal Court, and Donald Stewart, Sr., Chairman of the Tribal Council (the "tribal defendants"). The complaint challenged the validity of the Tribal Court judgment against the School District and National Farmers, alleging that the Tribal Court lacked jurisdiction over the controversy and that the constitutional rights of the School District and National Farmers had been violated by the Tribal Court action. The Tribal Court plaintiffs, Sage and Not Afraid, later were joined as defendants. *See* J.A. xv.

On November 3, 1982, the Federal District Court issued a temporary restraining order enjoining the Tribe and the tribal defendants from executing the Tribal Court judgment.[2] On December 29, 1982, the District Court permanently enjoined execution of the tribal court judgment by any of the individual federal court defendants on the ground that the Tribal Court lacked jurisdiction over the tort that was the basis of the default judgment. Pet. App. 14a-27a.

The Court of Appeals reversed. Based on the reasoning of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), and its own previous decisions, the majority held that the Crow Tribal Court was the proper forum for determining the extent of its own jurisdiction. Pet. App.

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[2] The District Court's subsequent January 26, 1983 Memorandum Opinion, Pet. App. 14a, incorrectly states (at 16a-17a) that the temporary restraining order was directed to Sage. Actually, at the time that order was issued, Sage and Not Afraid had not yet been joined as defendants. *See* J.A. xiii, xiv, xv.

7a. Consequently, the majority concluded that the complaint must be dismissed for failure to state a claim for federal relief.

In a separate opinion, Judge Wright concurred in the majority's conclusion that the complaint must be dismissed, stating that his "difference with the majority does not stem from any fundamental conflict over the policies at stake." Pet. App. 11a. Although Judge Wright dissented from the holding that federal court review of tribal proceedings was precluded, he stated that such review would be appropriate only after exhaustion of tribal court remedies. Exhaustion was found to be required by the doctrine of comity and by "the federal policy of protecting and strengthening tribal institutions." Pet. App. 11a. Since the School District had not even made an appearance in Tribal Court, the available Tribal Court remedies obviously had not been exhausted and the complaint therefore should have been dismissed.

On August 1, 1984, shortly after the Court of Appeals' mandate was issued, the Crow Tribal Court issued a writ of execution pursuant to which some School District property was seized. Sale of the property was scheduled for August 23. On August 22, the School District appeared in the Tribal Court for the first time, seeking to enjoin the sale and to set aside the default judgment. That Court, in Orders dated August 22 and August 23, postponed the sale, and set a hearing to consider the School District's motion to set aside the default judgment. Br. in Opp. App. 1a-9a.

The School District also applied to Justice Rehnquist for a stay of the Ninth Circuit's mandate. Justice Rehnquist issued a temporary stay on August 21, 1984 and continued the stay on September 10. Reply Br. App. 1a-8a. On September 19, the Tribal Court entered an Order postponing a ruling upon the motion to set aside the default judgment until after final review of the federal court proceedings by this Court. Br. in Opp. App. 10a-15a.

SUMMARY OF ARGUMENT

1. This action cannot be maintained against the Crow Tribe, the Crow Tribal Council, the Crow Tribal Court, the Chairman of the Crow Tribe, and the judges of the Crow Tribal Court owing to their sovereign immunity. While sovereign immunity does not preclude suits against officials who are alleged to have acted beyond the scope of their authority or unconstitutionally, that rule is not applicable here. Only one of the individually named Crow respondents participated in or had anything to do with the actions challenged by the petitioners. That official, Tribal Court Judge Roundface, is not subject to the doctrine permitting injunctions against *ultra vires* actions because courts cannot be enjoined from proceeding in their own way to exercise jurisdiction.

2. The Federal District Court should not have entertained the suit challenging the jurisdiction of the Crow Tribal Court under the circumstances presented in this case. The Crow Tribal Court is the natural and logical forum for the resolution of reservation-based disputes involving tribal members. All defenses to the Tribal Court's jurisdiction should be raised and considered, at least in

the first instance, in that Court. The petitioners' failure even to pursue, let alone exhaust, any tribal court remedies, precludes any consideration of their claims by the federal courts. This result is supported not only by the policies underlying the exhaustion doctrine, but also by fundamental principles governing the relationship between the courts of two different sovereigns within a federal system and by this Court's decisions giving effect to Congress' policy of furthering tribal self-government and protecting the role of tribal courts in resolving civil disputes affecting important personal and property interests of both Indians and non-Indians. This is not an appropriate case in which to speculate about the exceptional circumstances under which it might be appropriate for federal courts to intervene by enjoining parties to tribal court proceedings.

3. The Crow Tribal Court has jurisdiction to adjudicate reservation-based tort claims involving tribal members. The authority to establish a system for resolving disputes arising within its territory and affecting its members is a fundamental characteristic of any organized and cohesive society. That authority is included in the Crow Tribe's retained, inherent sovereignty and it has not been divested by any federal law or by necessary implication of the Tribe's independent status.

The Crow Tribe has an essential interest in providing a forum for the resolution of reservation-based disputes involving its members. That is especially true in this case which also implicates the Tribe's interest in the health, safety and welfare of its children and in the standard of care exercised by those entrusted with their education. Denying the Crow Tribe's jurisdiction in this case would subject a suit arising on the reservation involving

reservation Indians to a forum other than the one they have established for themselves. That would undermine the authority of the tribal court and therefore would infringe on the right of the Crow Indians to govern themselves.

The Crow Tribal Court is not deprived of its jurisdiction by virtue of the nature of the School District or the title status of the school grounds. Although in form the School District is a political subdivision of the State, its substance is predominantly Indian. It takes full advantage of the governmental services, police, fire and judicial, provided by the Crow Tribe and the Bureau of Indian Affairs and does not enjoy the State's immunity from suit. States and their agents should not be treated any differently than Indian tribes which generally become subject to state jurisdiction when they venture off their reservations.

Although the status of land title has an important bearing on some Indian jurisdictional issues, it should not be relevant in this case where nothing would have been any different if the accident had happened on trust land. Moreover, congressional policy strongly disfavors the kind of impractical patterns of checkerboard jurisdiction which would make jurisdiction over tort claims turn on the title status of the land where accidents occur.

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ARGUMENT

I. Sovereign Immunity Bars This Action Against The Crow Tribe And The Crow Tribal Entities And Officials.

This Court repeatedly has held that Indian tribes are immune from suit without express authority in a federal statute or lawful consent. *Santa Clara Pueblo v.*

Martinez, 436 U.S. 49, 58 (1978); *Puyallup Tribe v. Washington Dept. of Game,* 433 U.S. 165, 172-73 (1977); *United States v. United States Fidelity & Guar. Co.,* 309 U.S. 506, 512 (1940); *Turner v. United States,* 248 U.S. 354, 358 (1919). The sovereign immunity defense is jurisdictional in nature. It can be raised at any stage of the litigation and, under most circumstances, will be considered by this Court even if it was not addressed by the lower courts. *Alabama v. Pugh,* 438 U.S. 781 (1978) (per curiam); *Edelman v. Jordan,* 415 U.S. 651, 678 (1974); *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 466-467 (1945); *Minnesota v. United States,* 305 U.S. 382, 388-389 (1939). *Cf. Patsy v. Florida Board of Regents,* 457 U.S. 496, 515 n.19 (1982) (Supreme Court did not address sovereign immunity issue raised sua sponte during oral argument where it was not briefed by the parties and the state agency expressly requested that the Court resolve the case on the basis of another issue).

Plaintiff brought this action against the Crow Tribe, the Crow Tribal Council,[3] the Crow Tribal Court, the Chairman of the Crow Tribe and the three judges of the Crow Tribal Court. The Crow respondents specifically alleged that the Federal District Court "is without jurisdiction over the Crow Tribal Council or Court and their respective members," Tribe's 9th Cir. Excerpt of Record 28, and argued to the Court of Appeals that this suit is barred by the sovereign immunity of the Crow Tribe, Crow

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[3] The Crow Tribe's Constitution (See Appendix B to the Crow Tribe's Ninth Circuit Brief) establishes the Crow Tribal Council "to represent, act and speak for the Crow Tribe in any and all tribal matters . . ." The Council consists of all duly enrolled, adult members of the Crow Tribe.

Tribe's Ninth Circuit Brief at 5-9. *See* Pet. App. 7a n.4.[4] No federal law authorizes this action against the Crow Tribe or its entities or officials, nor is there lawful consent. Hence, the action against the Tribe, the Tribal Council, the Tribal Court, and the tribal officials must be dismissed.

Under the rule of *Ex Parte Young,* 209 U.S. 123 (1907), sovereign immunity does not preclude suits against officials who are alleged to have acted beyond the scope of their authority or unconstitutionally.[5] This Court has

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[4] The sequence of events in the District Court did not provide an opportunity to address the sovereign immunity issue. The case was filed on November 3, 1982 and a temporary restraining order was issued on the same day. A hearing on the plaintiff's motion for a *preliminary* injunction originally was scheduled for November 15, 1982, but later was postponed until December 14. The Court issued a *permanent* injunction on December 29, 1982, followed by its Memorandum Opinion on January 26, 1983. Plaintiffs Sage and Not Afraid filed their notice of appeal on January 28, 1983. See J.A. xiii-xvii; Pet. App. 16a-17a.

On January 14, 1983, the Crow Tribe and the tribal defendants filed a motion to reconsider the Court's December 29, 1982 Order in which they alleged that the District Court lacked jurisdiction over the Crow Tribal Council, the Crow Tribal Court and their respective members. In that same document, the Crow defendants asked leave to file a Memorandum addressing these issues after the issuance of the forthcoming Opinion of the Court to which reference was made in the December 29, 1982 Injunction. Tribe's Ex. Record 28. But the opportunity to consider those matters was lost once Sage's notice of appeal was filed two days after the issuance of the District Court's January 26, 1983 Memorandum Opinion.

[5] Of course, under *Ex Parte Young,* such suits are generally limited only to prospective judicial remedies. Edelman v. Jordan, 415 U.S. 651 (1974).

applied the same rule to suits against tribal officials. *Santa Clara Pueblo v. Martinez, supra,* 436 U.S. at 59. *See also, Puyallup Tribe v. Washington Dept. of Game, supra,* 433 U.S. at 171-172. In the circumstances presented here, however, that rule does not permit this case to proceed against any of the tribal respondents officials or entities.

There is no basis to allow suit against the Crow Tribal Chairman, Donald A. Stewart, Sr., or against two of the three Judges of the Crow Tribal Court, Glen Birdinground and Ira Lefthand, because these three officials did not participate in any of the actions challenged by the petitioners. As stated in *Ex Parte Young, supra,* 209 U.S. at 157:

> In making an officer of the state a party defendant in a lawsuit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as representative of the state, and thereby attempting to make the state a party.

The Crow Tribal Council, which, as previously noted (*supra* at 8 n.3), consists of all adult members of the Crow Tribe and represents, acts and speaks for the Crow Tribe, enacted the ordinance which established the Crow Tribal Court. J.A. 1-4. The Council's stated intent was to establish tribal courts to exercise the jurisdictional authority over the Crow Reservation that has not been foreclosed by acts of the United States Congress. J.A. 2. The Council has not had anything to do with the lawsuit between Sage and the School District and has not taken, or threatened, or been directed to take, any actions which could appropriately be enjoined. Consequently, the Crow

Tribal Council is not a proper party to the suit initiated by National Farmers and the School District.

The only individually named tribal official who had anything to do with the actions challenged by the petitioners is the Tribal Court Judge who signed the default judgment and other orders of the Crow Tribal Court, Judge Eddie Roundface. *See* Br. in Opp. App. 1a-15a. But the doctrine of *Ex Parte Young, supra,* does not "include the power to restrain a court from acting in any case brought before it." *Ex Parte Young, supra,* 209 U.S. at 163. As further stated in that landmark decision:

> The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction, is plain, and no power to do the latter exists because of a power to do the former.

Ibid. Accord, Donovan v. Dallas, 377 U.S. 408, 412-413 (1964), quoted *infra* at 15-16. *See also, General Atomic Co. v. Feller,* 434 U.S. 12 (1977) (per curiam); *Juidice v. Vail,* 430 U.S. 327, 335-336 (1977); *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 599-604 (1975). Accordingly, sovereign immunity precludes maintenance of this suit against Judge Roundface or the Crow Tribal Court.

The Crow Tribe and all of the Crow tribal officials and entities therefore must be dismissed as parties to this suit. However, dismissal of the Crow respondents does not automatically require dismissal of the action because the Tribal Court plaintiffs, Sage and Not Afraid, were joined as defendants in the Federal Court suit and are respondents before this Court. The additional questions that

must be addressed in this setting are whether the action challenging the Tribal Court's jurisdiction against the two private plaintiffs in the Tribal Court suit states a claim for relief that can be brought before the Federal Court and, if so, whether it is appropriate for the Federal Court to consider that claim under the circumstances of this case.

The position of the Crow Tribe is that the Federal District Court clearly erred in entertaining this suit for the reasons expressed by Judge Wright in his concurring opinion (Pet. App. 11a-13a), as amplified in Part II of this Brief. This case, with or without the Crow tribal officials and entities, is not an appropriate vehicle for addressing the abstract question of whether federal courts ever can enjoin ongoing tribal court proceedings on the grounds that the tribal court exceeded the bounds of its jurisdiction as defined by federal law. If, however, these federal court jurisdictional issues are decided in favor of the petitioners, this case should be remanded for consideration of an issue arising from the Tribe's immunity from suit which was not addressed by either the District Court or the Court of Appeals: "whether in equity and good conscience the [federal] action should proceed among the [remaining] parties, or should be dismissed" because the Crow Tribe and the tribal entities and officials are regarded as indispensible. *See* F.R.Civ. P. Rule 19(b); *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968). *Cf. Patsy v. Florida Board of Regents,* 457 U.S. 496, 415 n.19 (1982) (leaving the immunity issue for consideration on remand).

II. The Federal District Court Should Not Have Entertained The Suit Challenging The Crow Tribal Court's Jurisdiction Over The Tort Suit.[6]

This case, which has turned into a procedural and jurisdictional nightmare, began simply enough. A minor member of the Crow Tribe who lives on the Crow Reservation was hit by a motorcycle on school grounds within the Crow Indian Reservation. His guardian, who is also a tribal member living on the Reservation, consulted with a local lawyer and then did the natural and logical thing: she filed suit in the local court of general civil jurisdiction, the Crow Tribal Court, *see* J.A.1, alleging that the accident was the result of the maintenance of unsafe conditions at the school and inadequate supervision by school authorities. After that, there was some confusion owing to the failure of the School Board Chairman to notify anyone else that he had been served with process or that the suit had been brought.[7] That kind of occurrence is not infrequent. In due course, the failure to respond to the Court's summons resulted in a predictable action, the entry of a default judgment. The School District and its insurer received actual notice of the default judgment in

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[6] In the event that this Court agrees with the argument in Part I of this Brief and dismisses the Crow Tribe and the tribal entities and officials owing to their immunity from suit, Parts II and III should be deemed to be a Brief by the Crow Tribe as amicus curiae. The Crow Tribe obviously has a significant interest in the outcome of the issues addressed in Parts II and III even if it is not a party to the case. Since the Crow Tribal Court and its judges have not been afforded the opportunity to address or rule on the issues briefed in Parts II and III, the arguments presented in those sections do not necessarily state the position of the tribal court or its judges.

[7] There is no claim that the School District was not properly served.

ample time to avail themselves of the opportunity to set it aside under the applicable Tribal Court rule. J.A. 17; Pet. App. 16a. Up to this point, nothing unusual or extraordinary had occurred.

Then, instead of pursuing its readily available Tribal Court remedies, the defendant in the Tribal Court suit invoked the jurisdiction of the Federal District Court claiming, *inter alia,* that the Crow Tribal Court lacked authority to resolve the tort claim that arose on the Crow Reservation and involved a tribal member. That is where the confusion and the trouble began. Under well-established principles governing the relationship between courts, the federal court should not have entertained the suit. Rather, as all three Ninth Circuit judges agreed, the "proper forum for [determining the scope of tribal court jurisdiction], at least in the first instance, is not a federal court but a tribal court." Pet. App. 7a, 11a-12a. Where, as here, a tribal court has simply asserted jurisdiction over a suit brought by a tribal member with respect to an accident that took place within the confines of the Reservation and the tribal court defendants never even pursued, no less exhausted, *any* tribal court remedies, federal court intervention clearly is inappropriate. Pet. App. 11a-13a (Wright, J. concurring).

Judge Wright's concurring opinion properly relies on the well-established doctrine requiring the pursuit and exhaustion of remedies available in one forum before invoking the jurisdiction of another forum in connection with the same controversy.

> Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently

> and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.

Weinberger v. Salfi, 422 U.S. 749, 765 (1975). All of these considerations counsel strongly against federal courts entertaining suits challenging the jurisdiction of tribal courts before those issues even have been presented to the tribal courts. Judge Wright's conclusion is also bolstered by fundamental principles governing the relationship between the courts of different sovereigns operative within the federal system as well as by the decisions of this Court giving effect to Congress' policy of furthering tribal self-government and protecting the role of tribal courts in resolving civil disputes affecting important personal and property interests of both Indians and non-Indians.

"Early in the history of our country, a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time." *Donovan v. Dallas,* 377 U.S. 408, 412 (1964). The rationale for that rule was stated in *Peck v. Jenness,* 7 How. (48 U.S.) 612, 625 (1849), and partially repeated in *Donovan v. Dallas, supra:*

> . . . where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but in necessity. For if we may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one if they dare to proceed in the other . . . The fact, therefore, that an injunction issues only to the parties before

> the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum. *See also, Ex Parte Young,* quoted *supra* at 11.[8]

Courts are more reluctant to interfere with judicial proceedings than they are to enjoin the actions of executive officials. *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 603-604 (1975). This common sense principle is embodied in statutory form in 28 U.S.C. § 2283. *See* n.8 *supra.* It has been applied in a variety of settings to prevent disruption of civil or criminal justice systems and to avoid the waste attendant upon duplicative legal proceedings. It manifests a policy of comity and mutual respect between the courts of different sovereigns within an overall federal system. *See Webb v. Webb,* 451 U.S. 493 (1981); *Trainor v. Hernandez,* 431 U.S. 434 (1977); *Juidice v. Vail,* 430 U.S. 327 (1972); *Huffman v. Pursue Ltd.,* 420 U.S. 592, 603, 604 (1975); *Steffel v. Thompson,* 415 U.S. 492, 462 (1974); *Younger v. Harris,* 401 U.S. 37 (1971). As stated in *Huffman v. Pursue, Ltd., supra,* 420 U.S. at 604:

> . . . interference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent

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[8] The one exception to the general rule noted in Donovan v. Dallas, *supra,* is for cases in which one court has obtained custody over property through in rem or quasi in rem proceedings. In that situation, the court with such custody has exclusive jurisdiction to proceed. 377 U.S. at 412. Congress has also permitted federal courts to enjoin proceedings in state courts where it is found to be necessary to aid the federal court's jurisdiction, to protect or effectuate its judgments, or as expressly authorized by statute. 28 U.S.C. § 2283. None of those circumstances is present here.

> to vindicate any constitutional objections interposed against those policies.

The Court of Appeals therefore was clearly correct (Pet. App. 5a-7a) in drawing a distinction between federal court review of challenges to adjudicatory, as opposed to regulatory, jurisdiction and in applying more restrictive standards to suits seeking to enjoin judicial proceedings. *See, e.g., Middlesex Ethics Comm. v. Garden State Bar Ass'n.,* 457 U.S. 423, 431 (1982) ("*Younger v. Harris,* [401 U.S. 37 (1971)], and its progeny espouse a strong federal policy against federal court interference with pending state judicial proceedings absent extraordinary circumstances"); *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 297 (1970) ("Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy.")

The institutions of tribal governments, especially tribal courts, are entitled to no less respect. Putting aside for a moment the limitations on their powers, there is no doubt that "[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations." *Williams v. Lee,* 358 U.S. 217, 223 (1959). The Court has repeatedly emphasized and given effect to "Congress' objective of furthering tribal self-government . . ." *New Mexico v. Mescalero Apache Tribe,* 103 S.Ct. 2378 (1983). *See also, Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 138 n.5 (1982); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143-144 and n.10 (1980); *Morton v. Mancari,* 417 U.S. 535, 551 (1974). In particular, "[t]ribal courts have repeatedly been recognized as

appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 65 (1978). The crucial role of tribal courts as well as other tribal institutions in resolving civil disputes arising on Indian reservations has carefully and consistently been recognized and protected. *Santa Clara Pueblo v. Martinez, supra,* 436 U.S. at 59-60; *Fisher v. District Court,* 424 U.S. 382 (1976) (per curiam); *United States v. Mazurie,* 419 U.S. 544, 548 (1975); *Kennerly v. District Court,* 400 U.S. 423 (1971) (per curiam) *Williams v. Lee,* 358 U.S. 217 (1959).

The decision in *Santa Clara Pueblo v. Martinez, supra,* epitomizes these principles. There, despite the existence of a federal statute, the Indian Civil Rights Act of 1968 (ICRA), which was intended in part to strengthen the position of individuals against tribes, this Court held that the ICRA does not authorize implied federal court actions against tribes or tribal officials for alleged violations of the Act.[9] In reaching that conclusion, this Court relied on "the congressional goal of protecting tribal self-government," the serious financial burden that defending federal court suits would impose on "already 'financially disadvantaged' tribes," and "the intrusive effect of federal ju-

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[9] Prior to the *Santa Clara* decision, lower federal courts were reviewing complaints brought against tribal institutions. To minimize interference with those institutions, those courts had imposed the requirement that tribal remedies must be exhausted prior to the filing of the federal suit. *See* Howlett v. Salish and Kootenai Tribes, 529 F.2d 233, 239 (9th Cir. 1976); Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), *cert. denied,* 424 U.S. 958 (1976); Janis v. Wilson, 521 F.2d 724, 727 (8th Cir. 1975); McCurdy v. Steele, 506 F.2d 653, 656 (10th Cir. 1975); O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140 (8th Cir. 1973). *See also,* Pet. App. 12a-13a (Wright, J., concurring).

dicial review upon tribal self-government." 436 U.S. at 59-60, 65, 70. Of particular importance to this case, *Santa Clara* bespeaks a policy explicitly recognizing that vital claims predicated on federal law are properly raised and finally decided in tribal courts and other tribal institutions. 436 U.S. at 65-66. *Cf. Webb v. Webb,* 451 U.S. 493, 499-501 (1981) (Supreme Court will not consider claim arising under federal law that has not properly been presented to the state courts.)[10] All of these considerations apply with special force to preclude the kind of direct interference with an ongoing tribal court proceeding that is exemplified by the injunction issued by the Federal District Court against the Crow Tribal Court and its judges.

This consistent line of decisions in the Court's Indian cases leaves no doubt that potential interference by federal courts in ongoing tribal court proceedings should be governed by principles no less restrictive than those that this Court has applied to the relationship between state and federal courts. Absent extraordinary circumstances, federal courts should not entertain suits seeking to interfere with or restrain suits pending before tribal courts. For the reasons so well stated by Judge Wright in his concurring opinion, Pet. App. 11a-13a, such interference is especially unwarranted where the authority of the tribal courts has been ignored and circumvented, and available tribal court remedies have not ever been pursued, no less exhausted.

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[10] This case, in its current posture, does not present the issue of whether, or to what extent, federal questions decided by tribal courts may be reviewed by this Court or other federal courts following the issuance of final tribal court judgments and the exhaustion of tribal court remedies. *See Santa Clara, supra,* 436 U.S. at 65 n.21.

In this case, there are no extraordinary circumstances. The Crow Tribal Court is the natural and logical forum for the resolution of claims by members of the Crow Tribe predicated on events taking place within the Reservation. This is not an instance, for example, in which a tribal court assumed jurisdiction over a suit between two non-members or involving off-reservation conduct. *See* Pet. App. 12a (Wright, J. concurring). Nor is there any indication that the Tribal Court proceeding was motivated by a desire to harass or was conducted in bad faith or pursuant to a facially and obviously invalid tribal law. *Cf. Juidice v. Vail, supra,* 430 U.S. at 338. At the time that the federal court's jurisdiction was invoked, there was no emergency or immediate threat of irreparable harm. No writs of execution had been issued; no property had been seized; no public sale had been scheduled. The defendant in the Tribal Court suit had not even attempted to exhaust any of the tribal court remedies that were available to it and had exhibited complete disregard for a functioning court of a recognized sovereign. Pet. App. 13a (Wright, J. concurring). *Cf. Cowan v. Rosebud Sioux Tribe,* 404 F. Supp. 1338, 1340, 1341 (D.S.D., 1975). There was ample opportunity for the tribal court defendant to move to set aside the default judgment and to present any federal claims that it might have to the tribal court including contentions that the tribal court lacked jurisdiction or that its procedures did not satisfy due process requirements. Pet. App. 13a (Wright, J. concurring). *Cf. Juidice v. Vail, supra,* 430 U.S. at 337 and n.14. Under these conditions, all of which were known to the District Court at the time its permanent injunction was issued, the federal court suit should have been dismissed.

This case does not present an appropriate occasion for speculating on the precise circumstances under which

federal court intervention in tribal court proceedings might be appropriate. For purposes of this case, it can be assumed *arguendo* that federal courts can enjoin *parties* to tribal court actions (not tribal courts or tribal judges) when tribal court remedies have been exhausted and the requirements of 28 U.S.C. § 2283 are satisfied or

> in those cases where the District Court properly finds that the [tribal] proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is "flagrantly and patently violative of express constitutional [or federal statutory] prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."

Juidice v. Vail, supra, 430 U.S. at 338, *quoting Huffman v. Pursue, Ltd., supra,* 420 U.S. at 611. Plainly, this is not such a case.

III. The Crow Tribal Court Has Jurisdiction Over The Tort Suit Brought By Tribal Members Against The School District With Respect To An Accident Occurring Within The Crow Reservation.

A. Indian Tribes Retain the Inherent Sovereign Power To Adjudicate Civil Causes of Action Arising Within Reservations and Involving Tribal Members.

Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." *New Mexico v. Mescalero Apache Tribe,* 103 S.Ct. 2378, 2385 (1983) *(Mescalero Apache)*; *United States v. Mazurie,* 419 U.S. 544, 557 (1975). Tribes retain their inherent tribal powers except to the extent that such powers have been divested by federal law or by necessary implication of their dependent status. *Mescalero Apache, supra,* 103 S.Ct. at 2385; *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 137 (1982) (*Merrion*); *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S.

134, 152 (1980) (*Colville*). These powers include the exercise of civil jurisdiction over the conduct and activities of non-Indians occurring within boundaries of Indian reservations. *Mescalero Apache, supra,* 103 S.Ct. at 2384-2387; *Merrion, supra,* 455 U.S. at 137, 144 and 145 nn.11 and 12 (approving *Buster v. Wright,* 135 F. 947 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906)); *Colville, supra,* 447 U.S. at 152-153. *See also, Babbit Ford, Inc. v. Navajo Indian Tribe,* 710 F.2d 587 (9th Cir. 1983), *cert. denied,* — U.S. —; *Cardin v. De La Cruz,* 671 F.2d 363 (9th Cir. 1982), *cert. denied,* 459 U.S. 967; *Knight v. Shoshone & Arapahoe Tribe,* 670 F.2d 900 (10th Cir. 1982); *Iron Crow v. Oglala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956).

For tribal powers to be abrogated or diminished by federal statutes, there must be "clear indications of legislative intent." *Merrion, supra,* 455 U.S. at 149, 152. Divestiture of tribal powers by virtue of the tribes' dependent status occurs

> in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights. . . [I]t must be remembered that tribal sovereignty is dependent on, and subordinated to, only the Federal Government, not the States.

Colville, supra, 447 U.S. at 153-154. Accord, *Mescalero Apache, supra,* 103 S.Ct. at 2385; *Merrion, supra,* 455 U.S. at 147 n.13.

One of the hallmarks of any organized and cohesive society is a system for resolving disputes in an orderly and predictable manner. "Without such a 'legal system,'

social organization and cohesion are virtually impossible. . ." *Boddie v. Connecticut,* 401 U.S. 371, 374 (1971). The power to establish a mechanism or system for the resolution of civil disputes arising within the territory of a sovereign and affecting its members unquestionably is an essential and inherent attribute of Indian sovereignty "because it is a necessary instrument of self-government and territorial management." *Merrion, supra,* 455 U.S. at 137. *See Santa Clara Pueblo v. Martinez, supra,* 436 U.S. at 59-60, 65; *Williams v. Lee,* 358 U.S. 217 (1959)[11]

There is no serious claim by the petitioners that the power of the Crow Tribe to establish such a judicial system has been abrogated or limited by any Act of Congress.[12] Nor could that power be divested by virtue of the Tribe's dependent status. The exercise of judicial authority by Crow courts over civil causes of action arising within the Reservation and affecting tribal members is not in any way inconsistent with the overriding interests of the federal government. Most such disputes, including the present one, would not even be cognizable in the federal courts and there is no federal interest that is the least bit threatened by the exercise of tribal court jurisdiction in such matters. *See Santa Clara Pueblo v. Martinez, supra,* 436 U.S. at 59-60, 65; *Williams v. Lee, supra.*

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[11] This aspect of tribal sovereignty has been recognized by all three branches of the federal government. See Brief of Amici Assiniboine and Sioux Tribes, et al. at 5-14; Brief of United States at 14-18.

[12] The argument of the State of Washington as amicus curiae (Br. at 8-10) based on Article 1 of the Second Treaty of Fort Laramie, 15 Stat. 649 (1868), is foreclosed by this Court's decisions in Kennerly v. District Court, 400 U.S. 423 (1971); and Williams v. Lee, 358 U.S. 217 (1959). See Brief of United States at 14 n.5; Brief of Amici Assiniboine and Sioux Tribes, et al. at 12-13.

So even if it is assumed *arguendo* that the interests of the State of Montana are implicated by the assumption of such jurisdiction, that would not make any difference because "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Colville, supra,* 447 U.S. at 154.

The petitioners' entire case and the District Court's holding are predicated on their reading of *Montana v. United States,* 450 U.S. 544 (1981). They have not made any effort to integrate *Montana* with prior or subsequent decisions or with the analytic framework the Court has employed in other cases addressing tribal sovereignty issues such as *Mescalero Apache, Merrion* and *Colville.*[13] While there may be some tension between *Montana* on the one hand and *Mescalero Apache, Merrion* and *Colville* on the other, *see, e.g. Confederated Salish & Kootenai Tribes v. Namen,* 665 F.2d 951, 963 (9th Cir. 1982), *cert. denied,* 459 U.S. 977, a careful analysis of *Montana* reveals that it is predicated on the absence of a nexus between the conduct of non-Indians hunting or fishing on non-Indian owned lands within the reservation and any significant Indian interest. This point is stressed several times throughout the opinion. *See* 450 U.S. at 558 n.6, 564 and n.13, 566 and n.16. *Montana* also expressly stated that tribes have

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[13] Their approach is exemplified by the District Court's decision stating that Williams v. Lee, 358 U.S. 217 (1959), is regarded as "old law," presumably because it was thought to be rendered obsolete by *Montana*. Pet. App. 23a-24a. But *Williams* was cited three times in *Montana* itself, 450 U.S. at 564, 565, 566, without any hint that it was being overruled sub silentio. It has been cited and followed repeatedly in this Court's decision, most recently in Three Affiliated Tribes v. Wold Engineering, 104 S.Ct. 2267 (1984). *See also,* e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 n.9, 142 (1980).

inherent power "to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." 450 U.S. at 566.

Properly understood, *Montana* stands for the proposition that there must be some relationship, connection, or nexus between the reservation-based activities of non-Indians and a significant Indian interest in order for those non-Indian activities to be subject to tribal jurisdiction. In the vernacular of *Williams v. Lee, supra,* 358 U.S. at 219-220, *Montana* fits into the category of cases "where essential tribal relations were not involved and . . . where the rights of Indians would not be jeopardized, [and therefore] the state action did not infringe on the right of reservation Indians to make their own laws and be ruled by them." *See also, Colville, supra,* 447 U.S. at 152-53 ("Included in this [retained] tribal [sovereign] power is a broad measure of civil jurisdiction over the activities of non-Indians on Indian Reservation lands in which the tribes have a significant interest.") Indeed, that is precisely how *Montana* was construed and limited by a unanimous Court in *Mescalero Apache, supra,* 103 S.Ct. at 2384 and n.12. *Mescalero Apache* also expressly reaffirmed the *Colville* holding that "'tribes retain any aspect of their sovereignty not inconsistent with the overriding interests of the National Government.'" 103 S.Ct. at 2385.

Viewed in the light shed by the Court's other Indian opinions, there is no doubt that *Montana* fully supports the jurisdiction of the Crow Tribal Court over reservation-based claims asserted by tribal members. Sage's suit most assuredly involves essential tribal interests. Unfortunately, accidents occur and a society must devise a system of resolving the disputes to which they give rise.

Such a system is close to, if not at, the core of a society's "political integrity." *Montana, supra,* 450 U.S. at 566. *See, Santa Clara Pueblo v. Martinez, supra,* 436 U.S. at 59-60, 65; *Williams v. Lee, supra.* As stated in *Boddie v. Connecticut, supra,* 401 U.S. at 374:

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitely settle their differences in an orderly predictable manner. . . [W]ith the ability to seek regularized resolution of conflicts individuals are capable of independent action that enables them to strive for achievement without the anxieties that would beset them in a disorganized society.

Accord, Nevada v. Hall, 440 U.S. 410, 424 (1979) (emphasizing a state's substantial interest in providing full protection to those who are injured on its highways through the negligence of both residents and nonresidents); Collins, "Implied Limitations on the Jurisdiction of Indian Tribes," 54 Wash. L. Rev. 470, 518 (1979).

In this case, there are vital ties between essential tribal interests and the Crow Tribal Court's jurisdiction over Sage's tort claim. Most importantly, Sage and his guardian, Not Afraid, are tribal members and the accident took place within the Crow Tribe's political boundaries. Denying the Crow Tribal Court jurisdiction over matters arising within the Reservation and affecting its members indisputably "undermine[s] the authority of the tribal courts . . . and hence . . . infringe[s] on the right of the Indians to govern themselves." *Santa Clara Pueblo v. Martinez, supra,* 436 U.S. at 59, citing and quoting *Fisher v. District Court,* 424 U.S. 382, 387-388 (1976); and *Williams v. Lee, supra,* 358 U.S. at 223. *See also,*

McClanahan v. Arizona Tax Comm'n., 411 U.S. 164, 179 (1973).[14]

Moreover, the Crow Tribe has an especially significant interest in the dispute between Sage and the School District. Eighty-five percent of the students attending the Lodge Grass School are Crow. The Lodge Grass School Board consists of nine members of whom five are Crow Tribal members. *See supra* at 1-2. The Tribal Court complaint alleges that the accident was caused by the School District's negligence in maintaining the school parking lot in an unsafe condition and in not providing adequate supervision for its students during school hours. The Tribe surely has an essential interest in the health, welfare and safety of its children and in the standard of care exercised by those entrusted with their education. *See* 25 U.S.C. § 1901(3). *See also, infra* at 29-30.

To summarize, the Crow Tribal Court has jurisdiction over Sage's tort claim because the exercise of such juris-

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[14] This case would be more difficult if the issue were whether the exercise of concurrent state court jurisdiction over reservation-based tort claims involving tribal members infringes on essential tribal interests. *See* Williams v. Lee, *supra* (upholding *exclusive* jurisdiction of tribal courts over a reservation-based contract action brought by a non-Indian against an Indian). *See also,* Santa Clara Pueblo v. Martinez, *supra,* 436 U.S. at 59 and n.9 ("subjecting a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves . . . may undermine the authority of the tribal court . . . and hence . . . infringe on the right of the Indians to govern themselves."); *State ex. rel. Flammond v. Flammond,* — Mont. —, 621 P.2d 471 (1980). The answer to the question posed by concurrent state court jurisdiction may depend upon whether the Indian party appears voluntarily or involuntarily in state court. *See* Three Affiliated Tribes v. Wold Engineering, 104 S.Ct. 2267 (1984). That issue is not presented here where the only question is whether the tribal court properly can exercise any jurisdiction, be it concurrent or exclusive, over such suits.

diction implicates essential tribal interests and because authority to adjudicate reservation-based civil disputes involving tribal members is part of the Crow Tribe's retained, inherent sovereignty which has not been divested by any federal law or lost by virtue of the Tribe's dependent status. We next consider petitioner's claims that the Tribal Court lacks jurisdiction over Sage's suit because of the nature of the School District and/or the title status of the school grounds.

B. The Crow Tribal Court is Not Deprived of Its Jurisdiction by the Nature of the School District or the Title Status of the School Grounds.

There are two predicates underlying the petitioners' argument, the alleged "non-Indian" nature of the School District and the fee status of the lands on which the Lodge Grass School is located. Neither of these factors should have any bearing on the Tribal Court's jurisdiction over Sage's suit. To the extent that it has any relevance at all, the nature of the School District supports the Tribal Court's jurisdiction.

Although the School District is organized pursuant to State law, it is, in reality, predominantly Crow. As previously noted, five of the nine members of the elected school board are members of the Crow Tribe as are 85 percent of the children attending the school. Many of the teachers and other school employees also are Crow members. The extensive links between the School District and the Crow Tribe differentiate the School District from the private, individual, non-Indian hunters and fishers involved in the *Montana* litigation. On a spectrum with Indians on one end and non-Indians on the other, the School District is somewhere in between, a hybrid, but closer to

the Indian side. *Cf. United States v. Mission Golf Course,* 548 F. Supp. 1177, 1181, 1182 (D.S.D. 1982), *aff'd* 716 F.2d 907 (8th Cir. 1983) *cert. denied,* — U.S. —.

In similar situations, this Court has looked to the substance of an organization or entity, not its form, in deciding jurisdictional questions. In *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 157 n.13 (1973), the Court stated that "the question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business." Illustrating that point, in *Ramah Navajo School Board v. Bureau of Revenue,* 458 U.S. 832 (1982), the Court as well as the parties treated the Indian school as a tribal entity even though it was incorporated under state law. *See also, Eastern Navajo Industries, Inc. v. Bureau of Revenue,* 552 P.2d 805 (N.M. App. 1976), *cert. denied,* 430 U.S. 959 (corporation formed under state law in which Indians own 51 percent of its stock held to be an Indian entity for purposes of determining the validity of a state tax). Similarly, in this case, the most significant aspects of the School District for jurisdictional purposes are that it is controlled by Crow Indians, that Crow Indians constitute the vast majority of the children it educates, and that the education of Crow children is an extremely important governmental matter both to the Crow Tribe and to the federal government. *See Ramah Navajo School Board v. Bureau of Revenue, supra.* In these circumstances, the nominal form of the organization and its formal designation as "Indian" or "non-Indian" are immaterial.[15]

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[15] This point is underscored in another way by *Mescalero Apache, supra, Ramah Navajo, supra,* and White Mountain

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Moreover, the School District avails itself of significant Crow governmental services. When there are disturbances or law enforcement problems at the Lodge Grass School, the Crow police are called upon to respond. Fire protection is provided by the Crow Fire Department. Truancy and delinquency matters are handled by the Crow Juvenile Court. The School District should not be allowed to take full advantage of Crow governmental services provided by the Tribe or the federal government while at the same time maintaining an immunity from Crow jurisdiction. *See Merrion, supra,* 455 U.S. at 137-138. (Oil companies held subject to tribal severance tax because, *inter alia,* they benefit from "the provision of police protection and other [tribal] governmental services, as well as from 'the advantages of a civilized society' that are assured by the existence of tribal government.")

Nor is there any merit to the suggestion that the School District's status as an agency of the State deprives the Crow Tribal Court of jurisdiction over Sage's suit. To begin with, any such defense must be raised in the first instance in the Crow Tribal Court. Sovereign immunity has never been employed in a way that would permit an entity claiming that defense to avoid appearing and filing an answer in the forum in which it is sued. *See e.g., Nevada v. Hall,* 440 U.S. 410 (1979). Second, though the

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Apache Tribe v. Bracker, 448 U.S. 136 (1980). In all three of those cases, totally *non-Indian* corporations and individuals were held to be immune from some forms of *state* jurisdiction owing to their relationships with Indians. Similarly, in this case, the School District's significant contacts with Crow Indians renders it subject to the jurisdiction of the Crow Tribal Court.

School District is a political subdivision of Montana, it is not entitled to sovereign immunity under the Eleventh Amendment. *Mt. Healthy City School District v. Doyle,* 429 U.S. 274, 280 (1977). *See also,* Mont. Const. Art. II, §18; *Patsy v. Florida Bd. of Regents,* 457 U.S. 496, 519 n.* (1982) (White, J. concurring). Third, even if the School District were an arm of the State, it would become subject to the jurisdiction of another sovereign by conducting business within the other sovereign's territory. *Nevada v. Hall,* 440 U.S. 410 (1979). States and their agents should not be treated any differently than Indian tribes which generally become subject to state jurisdiction when they venture off their reservations. *Mescalero Apache, supra,* 103 S.Ct. at 2387 n.18; *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148-149 (1973). Reason and logic dictate that this principle should be reciprocal.

With regard to petitioners' reliance on its alleged fee title to the school land,[16] it is difficult to understand why that should be at all relevant in the context of this case.

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[16] When this case was before the District Court at the preliminary injunction hearing, see *supra* at 9 n.4, all parties apparently assumed that the Lodge Grass School was located on lands that were conveyed to the State pursuant to Section 16 of the 1920 Crow Allotment Act, 41 Stat. 756. See, Pet. App. 15a, 19a. It now appears, however, that a fee patent for the land was originally issued in 1911 and that it was sold to the School District in 1918. See Brief for Respondent Not Afraid at — n.1 and Part IIG. That is odd because there may not have been a legal mechanism for Crow lands to be taken out of trust and conveyed to non-Indians prior to the enactment of the Crow Allotment Act in 1920.

If, contrary to the Tribe's position, the title status of the school grounds is deemed at all relevant to the propriety of the Crow Tribal Court's jurisdiction over Sage's tort claim, this case should be remanded back to the District Court for further consideration of the title issue.

which does not directly involve property or property rights. The trust or fee status of property undoubtedly is significant for jurisdictional purposes when the Indian title to the land supplies the required nexus between the Indian interest and the activity that is subject to tribal jurisdiction. *See, e.g., Mescalero Apache, supra,* 103 S.Ct. at 2384; *Merrion, supra,* 455 U.S. at 138, 144-148; *Cohen's Handbook of Federal Indian Law* 257 (1982). But why would it, or should it, make any difference if the Lodge Grass School were located, for example, on trust land leased from the Crow Tribe or a Crow tribal member? *See* 25 U.S.C. § 415. Unlike the situation in *Montana,* where non-Indian hunters and fishers would not have been able to enter the Reservation to hunt or fish without the landowners' permission, nothing in this case would have been any different if the accident had taken place on land that happened to be held in trust. Here, the far more important jurisdictional factors are that the accident occurred on school grounds located within the Crow Tribe's political jurisdiction, *see Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973), and that the State of Montana voluntarily agreed to permit Crow Indian children "to attend the public schools of [the] state on the same conditions as the children of white citizens of said state" in return for which the State received the school land sections within the Crow Reservation that previously had been owned by the Crow Tribe. *See* Section 16 of the 1920 Crow Allotment Act, 41 Stat. 756. *Cf. Montana. supra,* 450 U.S. at 565 (tribes may regulate the activities of nonmembers who enter into consensual relationships with the tribe or its members).

Moreover, as this Court noted in *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 478 (1976), "Con-

gress by its more modern legislation has evinced a clear intent to eschew any such 'checkerboard' approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area." *See particularly,* 18 U.S.C. § 1151 (specifically defining "Indian country as, *inter alia,* "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation"); *DeCoteau v. District County Court,* 420 U.S. 425, 427 n.2 (1975). Here, as in *Moe, supra,* 425 U.S. at 478, the Court should reject the "impractical pattern of checkerboard jurisdiction" within Indian reservations that would be the inevitable consequence of upholding the petitioners' position.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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March 1985